BFI Waste Services *and* Teamsters Local 728. Case 10–RC–15442

September 30, 2004

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND MEISBURG

The National Labor Relations Board, by a three-member panel, has considered objections to an election held April 2, 2004, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 78 for and 61 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings[1] and recommendations[2] and finds that a certification of representative should be issued.[3]

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Teamsters Local 728, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit:

> All full-time and regular part-time drivers, including roll-off drivers, front-end drivers, residential drivers, recycle drivers, container delivery drivers, swing drivers, lead drivers, helpers, mechanics, tire men and yard men, employed by the Employer at its facilities located at 75 Curtis Road, Lawrenceville, Georgia and 1581 Fullenwider Road, Gainesville, Georgia, excluding all other employees, including driver-trainers, dispatchers, CSR's (Customer Service Representatives), office clerical employees, guards and supervisors as defined by the Act.

Dated, Washington, D.C. September 30, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MEISBURG, concurring.

We have seen a number of cases presenting variations of the tactic used by the Petitioner in this case—the solicitation on a petition of employee signatures that are then transferred to a widely circulated flyer, mailing, or poster. In some cases, the poster says no more than the

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

In adopting the hearing officer's credibility resolutions, however, we do not rely on her inference that the loyalties of employees Sean Alvey and Lalo Lopez toward the Petitioner may have been swayed by the influence of management. Nor do we rely on Feltus Prater's having made a false statement on the Employer's questionnaire, for the reasons discussed below.

In exceptions, the Employer argues that the hearing officer erred in denying its petition to revoke the Petitioner's subpoena duces tecum and in allowing the Petitioner's attorney to use the subpoenaed materials in cross-examination. The disputed materials, which the Employer contends are attorney work product, are questionnaires which its counsel used to interview witnesses in preparing this case. We find that, even if the hearing officer erred as the Employer contends, the error was harmless. With only one exception, the hearing officer's findings were not based on evidence elicited during the Petitioner's cross-examination with the questionnaires. That exception was her reliance on Prater's false statement in his response to the questionnaire, which she relied on in part in discrediting his testimony. We have disclaimed reliance on that statement.

[2] Although we adopt the hearing officer's finding that the Petitioner did not engage in objectionable misrepresentation under *Midland National Life Insurance Co.*, 263 NLRB 127 (1982) or *Van Dorn Plastic Machinery, Inc. v. NLRB*, 736 F.2d 343, 348 (6th Cir. 1984), cert. denied 469 U.S. 1208 (1985), we do not condone the creation and attribution of quotes to employees, at least where the union makes no prepublication effort to verify that the quotes fairly represent the views of the quoted employees. We simply find, under the circumstances of this case, that the Petitioner's conduct does not warrant overturning the election. More particularly, the alleged misrepresentations were not "pervasive": at most, the views of only two employees were arguably misrepresented. Nor was there any "artful deception" of employees. The employees directly involved were told that a quote would be prepared for them, and the accuracy of those quotations could have been verified by other employees.

[3] The Employer contends that the hearing officer erred in preventing its attorney from introducing evidence, or making an offer of proof, concerning alleged trespasses, threats, and assaults by union agents in December 2003. We find no merit in this contention. First, the Employer's attorney was allowed to make an offer of proof. Second, the excluded evidence was the subject of the Employer's Objection 3, which it withdrew before the hearing. Employer counsel explained that the evidence was being offered to show that the employees' consent to the Union's use of their pictures and statements was coerced by the alleged December conduct. That, however, was never the Employer's theory of the case: its position during its case in chief was not that the employees' consent was coerced, but that it was not informed. In effect, the Employer's counsel was attempting to introduce an entirely new theory after having rested his case. In these circumstances, we find that the hearing officer did not abuse her discretion by excluding the proffered evidence.

wording on the petition itself. In others, photographs of the employees are added. In still other cases, like this one, the poster offers quotations from the signers, in some instances, "quotations" that have been furnished after the fact by the union.

Although we have not found such conduct objectionable, I am concerned about its potential adverse impact on the laboratory conditions for an election. An employee who has merely signed a petition may feel compelled to support the union after seeing his signature or photograph reproduced on a poster. A slickly produced mass-mailing that includes ghost-written employee quotations may deceptively induce other employees to support the union.

I believe that we should, in an appropriate case, consider whether the photocopying or reproduction of employee signatures is subject to some sort of "fair use" rule, e.g., that we will not permit a party to take an employee's signature affixed to one medium and use it in another medium where the message is different, without the express permission of the employee. See *Gormac Custom Mfg.*, 335 NLRB 1192 (2001) (original petition contained express permission to re-use signatures in other material). However, because I am satisfied on the facts of this case that the Petitioner employed neither pervasive misrepresentation nor artful deception, see *Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d. 343, 348 (6th Cir. 1984), I concur in the decision.

Dated, Washington, D.C. September 30, 2004

Ronald Meisburg, Member

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